

SECOND REGULAR SESSION

# SENATE BILL NO. 617

97TH GENERAL ASSEMBLY

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INTRODUCED BY SENATOR RUPP.

Pre-filed December 9, 2013, and ordered printed.

TERRY L. SPIELER, Secretary.

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## AN ACT

To repeal sections 379.200 and 537.065, RSMo, and to enact in lieu thereof five new sections relating to the regulation of insurance.

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*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Sections 379.200 and 537.065, RSMo, are repealed and five new  
2 sections enacted in lieu thereof, to be known as sections 375.417, 375.418,  
3 375.419, 379.200 and 537.065, to read as follows:

**375.417. 1. As used in sections 375.417 and 375.418, the following  
2 terms mean:**

3 (1) "Duty to defend", the duty arising under a contract of  
4 insurance to provide a defense to the insured as required under the  
5 insurance contract;

6 (2) "Duty to indemnify", the duty of an insurer to pay settlements  
7 or judgments on account of the actual or potential liability of an  
8 insured for damages as required under the insurance contract;

9 (3) "Insured", a person or entity who is or may be entitled to a  
10 defense or indemnification under a contract of insurance;

11 (4) "Reservation of rights", a statement by or on behalf of an  
12 insurer of the reasons which may relieve the insurer of its duty to  
13 defend or duty to indemnify.

14 **2. A reservation of rights shall:**

15 (1) Be made in writing and be sent to the insured by mail, or  
16 delivered to the insured either in person or by electronic means  
17 pursuant to section 379.011;

18 (2) Be so provided to an insured no later than sixty days after  
19 the insurer has both:

20 (a) Received notice of the claim or suit against the insured, and

21           (b) Become aware of a basis for asserting its reservation of  
22 rights; and

23           (3) State with reasonable specificity the basis for the reservation  
24 of rights.

25           3. When an insurer has communicated a reservation of rights, the  
26 fact that the insurer has:

27           (1) Communicated the reservation of rights;

28           (2) Offered to defend subject to a reservation of rights;

29           (3) Provided a defense subject to a reservation of rights; or

30           (4) Declined or refused to withdraw a reservation of rights, shall  
31 neither constitute, nor be evidence of, breach of any duty owed to the  
32 insured, whether in tort, contract, or otherwise. In applying this  
33 section, it is the intent of the general assembly to reject and abrogate  
34 the holdings contained in *Butters v. City of Independence*, 513 S.W.2d  
35 418 (Mo. 1974), *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475 (Mo.  
36 App. 1992), *State ex rel. Mid-Century Ins. Co. v. McKelvey*, 666 S.W.2d 457  
37 (Mo. App. 1984), and *Truck Ins. Exch. v. Prairie Framing, LLC*, 162  
38 S.W.3d 64 (Mo. App. W.D. 2005), and other decisions suggesting or  
39 otherwise holding that an insurer may be found to have breached the  
40 duty to defend under the circumstances listed in this subsection.

41           4. Where an insurer offers or provides a defense subject to a  
42 reservation of rights, the insured remains bound by any and all  
43 provisions in the insurance contract including but not limited to any  
44 duty to cooperate.

45           5. Nothing in this section shall be construed to create any  
46 obligation to defend or indemnify which is not expressly set forth in  
47 the insurance contract.

48           6. Nothing in this section shall change the obligations an insurer  
49 may have with regard to the payment of minimum limits under the  
50 Missouri motor vehicle financial responsibility law prescribed in  
51 section 303.190.

52           7. This section does not apply to a contract of excess or umbrella  
53 insurance which does not contain a duty to defend as provided by the  
54 insurance contract.

55           8. Notwithstanding the provisions set forth in this section, any  
56 reservation of rights sent within sixty days of the effective date of this  
57 section shall meet the requirements of subdivision (2) of subsection 2

58 of this section.

375.418. If an insurer breaches its duty to defend, in the absence  
2 of a final adjudication of bad faith, the insurer shall be liable for any  
3 judgment against the insured or any settlement paid by the insured, but  
4 only up to the applicable limits of liability of the insurance  
5 contract. The insurer shall be liable for reasonable attorney fees and  
6 statutory court costs incurred by the insured in conducting the defense  
7 of the suit. In applying this section, it is the intent of the general  
8 assembly to reject and abrogate any previous case law which suggests  
9 or otherwise holds that a breach of the duty to defend, without a final  
10 adjudication of bad faith, allows for an award of damages in excess of  
11 the applicable limits of liability stated in the insurance contract,  
12 including but not limited to, the holding contained in *Columbia Cas. Co.*  
13 *v. HIAR Holding, LLC*, No. SC93026, – S.W.3d –, 2013 WL 4080770 (Mo.  
14 Aug. 13, 2013). This section shall apply to all causes of actions, suits,  
15 and claims unless the liability of the insurer has been determined by  
16 final judgment against the insurer before the effective date of this  
17 section.

375.419. When an insurer offers or provides a defense to a  
2 lawsuit filed against its insured, the insurer shall have the  
3 unconditional right to intervene in any such lawsuit. It is the intent of  
4 the general assembly to reject and abrogate any holding or suggestion  
5 contained in *State ex rel. Mid-Century Ins. Co. v. McKelvey*, 666 S.W.2d  
6 457 (Mo. App. 1984), *State ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307  
7 (Mo. App. 1993), and all other decisions which hold or suggest  
8 otherwise. Nothing in this section shall be construed to require an  
9 insurer to intervene in any such lawsuit.

379.200. 1. Upon the recovery of a final judgment against any person,  
2 firm or corporation by any person, including administrators or executors, for loss  
3 or damage on account of bodily injury or death, or damage to property if the  
4 defendant in such action was insured against said loss or damage at the time  
5 when the right of action arose, the judgment creditor shall be entitled to have the  
6 insurance money, provided for in the contract of insurance between the insurance  
7 company, person, firm or association as described in section 379.195, and the  
8 defendant, applied to the satisfaction of the judgment, and if the judgment is not  
9 satisfied within thirty days after the date when it is rendered, the judgment  
10 creditor may proceed in equity against the defendant and the insurance company

11 to reach and apply the insurance money to the satisfaction of the judgment. This  
12 section shall not apply to any insurance company in liquidation.

13 **2. No party shall add or join any other or different cause of**  
14 **action to a claim brought pursuant to this section, whether in the**  
15 **petition or by way of any counterclaim, cross-claim, or third-party**  
16 **claim.**

17 **3. In any proceeding brought to garnish on an insurance contract**  
18 **under this section or any other rule or provision of law:**

19 **(1) The judgment creditor shall have the burden of showing that**  
20 **the judgment was the result of a contested adversarial proceeding. If**  
21 **the judgment on which the garnishment was initiated was entered**  
22 **without trial by jury, the judge who entered that judgment shall not**  
23 **make the determination called for by this subdivision. As used in this**  
24 **section, a "contested adversarial proceeding" means a proceeding in**  
25 **which all parties have the opportunity to conduct discovery, present**  
26 **evidence, and cross-examine witnesses and the judgment debtor's**  
27 **insurer defended, or expressly declined to defend, its insured;**

28 **(2) If it is determined that coverage is provided for the loss, but**  
29 **the evidence does not show that the judgment resulted from a contested**  
30 **adversarial proceeding, the insurer shall have the right to trial by jury**  
31 **on the issue of the damages to be assessed against the judgment debtor**  
32 **as in the case of default judgments.**

537.065. 1. Any person having an unliquidated claim for damages against  
2 a tort-feasor, on account of bodily injuries or death, may enter into a contract  
3 with such tort-feasor or any insurer in his behalf or both, whereby, in  
4 consideration of the payment of a specified amount, the person asserting the  
5 claim agrees that in the event of a judgment against the tort-feasor, neither he  
6 nor any person, firm or corporation claiming by or through him will levy  
7 execution, by garnishment or as otherwise provided by law, except against the  
8 specific assets listed in the contract and except against any insurer which insures  
9 the legal liability of the tort-feasor for such damage and which insurer is not  
10 excepted from execution, garnishment or other legal procedure by such  
11 contract. Execution or garnishment proceedings in aid thereof shall lie only as  
12 to assets of the tort-feasor specifically mentioned in the contract or the insurer  
13 or insurers not excluded in such contract. Such contract, when properly  
14 acknowledged by the parties thereto, may be recorded in the office of the recorder

15 of deeds in any county where a judgment may be rendered, or in the county of the  
16 residence of the tort-feasor, or in both such counties, and if the same is so  
17 recorded then such tort-feasor's property, except as to the assets specifically listed  
18 in the contract, shall not be subject to any judgment lien as the result of any  
19 judgment rendered against the tort-feasor, arising out of the transaction for  
20 which the contract is entered into.

21 **2. No agreement under this section shall condition the protection**  
22 **of the assets of the alleged tort-feasor on the performance of any future**  
23 **act.**

24 **3. No insurer shall be required to enter into an agreement under**  
25 **this section. The fact that an insurer has not entered into an**  
26 **agreement under this section shall not be evidence of the commission**  
27 **of a tort or breach of contract.**

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